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No. 97-704

In the Supreme Court of the United States

OCTOBER TERM, 1997

PHILOMENA DOOLEY, ET AL., PETITIONERS

v.

KOREAN AIR LINES CO., LTD.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
ROBERT S. GREENSPAN
PHILIP A. BERNS
BARBARA B. O'MALLEY
BRUCE G. FORREST
DAVID B. SALMONS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the personal representative of a person who died as a result of injuries incurred on the high seas may seek damages for the decedent's pre-death pain and suffering.

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INTEREST OF THE UNITED STATES

The United States operates thousands of ocean-going vessels and aircraft in the course of its extensive civilian and military activities. In general, the United States has waived its sovereign immunity from civil suits arising within admiralty jurisdiction and is subject to wrongful death actions in ways similar to those involving private parties. See Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*; Public Vessels Act, 46 U.S.C. App. 781 *et seq.* The United States, therefore, has a strong interest in encouraging fair and uniform remedies that are harmonious with the intent of Congress as enacted in the Death on the High Seas Act (DOHSA), 46 U.S.C. App. 761 *et seq.*[1]

[1] As a matter of policy, the United States is not opposed to the recovery of damages reflecting the pain and suffering of air line passengers whose injuries result in death. The Department of Transportation (DOT) has supported H.R. 2005, 105th Cong., 1st Sess., a bill currently pending before Congress that would permit recovery for the decedents' pain and suffering in cases such as this by rendering the DOHSA inapplicable to aviation-related deaths on the high seas. Letter dated July 28, 1997, from DOT General Counsel Nancy E. McFadden to Rep. Bud Shuster, Chairman, House Committee on Transportation and Infrastructure. As a matter of statutory construction and application of

STATEMENT

1. Before Congress enacted the Death on the High Seas Act (DOHSA) in 1920, the law of admiralty permitted the anomaly, grounded in the common law, that a person injured by the tortious conduct of another could sue for damages, but no action could be brought by or on behalf of a person killed by that conduct. See generally Robert M. Hughes, *Handbook of Admiralty Law* 223 (2d ed. 1920). The harsh rule denying compensation when the victim died stemmed from the theory that a right of action was personal to the victim, and so expired when the victim died. As this Court explained over a century ago:

> [I]n the absence of an act of Congress or of a statute of a State, giving a right of action therefor, a suit in admiralty could not be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which was caused by negligence.

The Alaska, 130 U.S. 201, 209 (1889). See also *The Harrisburg*, 119 U.S. 199 (1886) (same).

By the beginning of this century, the injustice of that rule had prompted proposals in Congress to override the maritime doctrine denying recovery for negligent acts that resulted in death. The first bill to provide a remedy for death on the high seas that received a hearing was introduced on December 17, 1909. See 45 Cong. Rec. 245. That bill was drafted and promoted by the Maritime Law Association.[2] Congress thereafter held hearings on, debated, and amended versions of the death on the high seas legislation until final enactment of the DOHSA in 1920.

this Court's decisions, however, we believe that recovery for pain and suffering is inconsistent with the existing statutory regime prescribed by Congress under the DOHSA, 46 U.S.C. App. 761 *et seq*.

[2] See *To Authorize the Maintenance of Actions for Negligence Causing Death in Maritime Cases; To Permit the Owners of Certain Vessels and the Owners or Underwriters of Cargoes Laden Thereon To Sue in the U.S.; Liens on Vessels for Repairs, Supplies, or Other Necessaries: Hearing Before the House Comm. on the Judiciary*, 61st Cong., 2d Sess. (1910) (available on microfiche CIS No. 61 HJ-T.3) (*1910 Hearing*). In 1900, Representative Boutell introduced a bill pertaining to actions against steamship companies that was later described as being the first death on the high seas legislation, but that proposal was never acted upon. See 33 Cong. Rec. 2611; Robert M. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 117 (1921).

Section 1 of the DOHSA provides a right of action for "the death of a person * * * caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." 46 U.S.C. App. 761. The action must be brought by the decedent's personal representative, "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." *Ibid.* "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." DOHSA § 2, 46 U.S.C. App. 762. The DOHSA also speaks to the question of what happens to a pending personal injury claim upon the death of the injured person. Section 5 provides that, if a person brings a suit in admiralty for personal injuries wrongfully inflicted on the high seas and then dies before the suit can be brought to judgment, "the personal representative of the decedent may be substituted as a party and the suit may proceed * * * for the recovery of the compensation provided in section 762." DOHSA § 5, 46 U.S.C. App. 765. The DOHSA makes no provision for the decedent's own losses, nor does it allow any damages for non-pecuniary losses.

2. On September 1, 1983, Korean Air Lines (KAL) Flight KE007 strayed off course and flew over the airspace of the former Soviet Union. The airliner was shot down by Soviet military forces and crashed into the Sea of Japan. All 269 passengers were killed. The suits brought in the United States in several district courts were consolidated for a trial on liability in the District of Columbia. The jury concluded that respondent had engaged in "willful misconduct," a finding that lifted the $75,000 cap on dam-

ages under the Warsaw Convention in cases of ordinary negligence. See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476-1478 (D.C. Cir.), cert. denied *sub nom. Dooley* v. *Korean Air Lines*, 502 U.S. 994 (1991).

Subsequently, the multidistrict litigation panel returned all of the cases to the district courts where they were originally filed for the determination of damages. One of those damages proceedings reached this Court in *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 219-220 (1996). *Zicherman* involved claims for damages brought by the mother and sister of one of the KAL flight KE007 passengers for grief, mental anguish, and loss of society. The *Zicherman* Court concluded: "Where, as here, an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society." *Id.* at 231. *Zicherman* expressly left open "whether [DOHSA] § 762 contradicts the District Court's allowance of pain and suffering damages," since KAL did not challenge that ruling in its petition for a writ of certiorari. *Id.* at 230 n.4. See also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 215 n.1 (1986) (same).[3]

3. Petitioners are the personal representatives of several KAL Flight KE007 passengers who seek recovery for the pain and suffering experienced by the decedents between the time the aircraft was damaged by the Soviet antiaircraft missile and when it crashed on the high seas. Pet. Br. 3. On KAL's motion, the district court dismissed all claims for non-pecuniary damages. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996).

[3] Prior to *Zicherman*, two circuits had allowed decedents' personal representatives to "supplement" their pecuniary damages recovery under DOHSA for pre-death pain and suffering under a theory of general maritime law. See *Azzopardi* v. *Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-894 (5th Cir. 1984); *Barbe* v. *Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974). The Ninth Circuit, however, refused to do so in one of the post-*Zicherman* cases arising out of the KAL Flight KE007 incident, and this Court declined further review. *Saavedra* v. *Korean Air Lines*, 93 F.3d 547, 553-554 (9th Cir.), cert. denied, 117 S. Ct. 584 (1996). Other circuits had allowed such recovery under state survival statutes. See, *e.g.*, *Solomon* v. *Warren*, 540 F.2d 777, 792 n.20 (5th Cir. 1976); *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971).

The court of appeals affirmed. Pet. App. 1a-18a. Relying on this Court's decision in *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618 (1978), the court stated:

> Nonpecuniary damages may be recovered under general maritime law, but not, the Court held [in *Higginbotham*], when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages.

Pet. App. 9a. The court of appeals further observed that the DOHSA "contains only a very limited survival provision" (46 U.S.C. App. 765), which should be treated as "an expression of legislative judgment on the extent to which survival actions are to be permitted." Pet. App. 10a. But see *Gray* v. *Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), petition for cert. pending, No. 97-1209.

SUMMARY OF ARGUMENT

Although they arise from the same tortious act or omission, wrongful death and survival actions are legally distinct. That distinction was well understood by Congress in 1920 when it enacted the Death on the High Seas Act (DOHSA), 46 U.S.C. App. 761 *et seq*. The text of the Act provides three clear indications that Congress intended to limit the remedies in the DOHSA to a wrongful death action. Section 1 of the DOHSA, 46 U.S.C. App. 761, limits who can maintain the suit to the "personal representative" of the decedent, as opposed to the executor or administrator of the decedent's estate, as was common for state survival statutes enacted in that era. Section 2, 46 U.S.C. App. 762, limits the damages recoverable under the Act to compensation for "pecuniary loss" that can be established

by the persons who have lost the support of the decedent. Finally, Section 5 of the Act, 46 U.S.C. App. 765, permits the survival of a personal injury suit, but only for the limited purpose of allowing it to be transformed into a wrongful death action as prescribed by the Act. Petitioners' reading of that provision to provide concurrent wrongful death and survival actions would denude Section 5 of its natural and ordinary meaning.

Contrary to petitioners' submission, which contains scant discussion of the legislative history of the DOHSA, that history in fact demonstrates that Congress knew how to distinguish between survival and wrongful death actions, that it deliberately rejected several amendments to provide a survival remedy in earlier versions of the DOHSA, and that it made those choices to limit the liabilities faced by shipowners. That history removes any doubt that Congress meant exactly what it provided for in the Act.

Finally, this Court's decisions have recognized that general maritime law may provide supplementary remedies in the absence of an Act of Congress on the subject. That is not the case with respect to deaths on the high seas, however. This Court's cases have consistently held that, for such deaths, plaintiffs are limited to the remedies provided by the DOHSA. See *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 229 (1996); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 232 (1986); *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618, 625 (1978).

ARGUMENT

CONGRESS DID NOT INTEND FOR THE JUDICIARY TO SUPPLEMENT THE WRONGFUL DEATH ACTION PROVIDED IN THE DEATH ON THE HIGH SEAS ACT WITH A SURVIVAL ACTION FOR NON-PECUNIARY PAIN AND SUFFERING

In *Zicherman*, this Court held that the Warsaw Convention, rather than providing its own measure of damages, "permit[s] compensation only for legally cognizable harm" and "leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the

forum's choice-of-law rules." 516 U.S. at 231. The Convention thus "provides nothing more than a pass-through, authorizing [the Court] to apply the law that would govern in the absence of the Warsaw Convention." *Id.* at 229. The Court concluded in *Zicherman* that the DOHSA is the federal law applicable to deaths on the high seas. Moreover, "where DOHSA applies, neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Id.* at 230 (citing *Tallentire*, 477 U.S. at 232-233 and *Higginbotham*, 436 U.S. at 625-626).

Petitioners' contention that general maritime law nevertheless should provide a supplementary survival remedy for pain and suffering damages is unpersuasive. Both the text and legislative history of the DOHSA establish that Congress specifically considered and rejected providing a survival action. Moreover, this Court's decisions establish that general maritime law should not supplement statutorily-created remedies for deaths on the high seas.

A. The Language And Structure Of The DOHSA Evince Congress's Intent To Limit Remedies For High Seas Deaths And Not To Permit A Survival Action

When Congress enacted the DOHSA in 1920, it legislated against the backdrop of rules long established in admiralty law and at common law. Those judge-made doctrines created the rule, *actio personalis moritur cum persona*, which eliminated a right of recovery if the victim of a tort died. See generally Frances B. Tiffany, *Death By Wrongful Act* § 15 (2d ed. 1913). In overriding the common-law doctrine embodying that rule, state legislatures had recognized two distinct sets of injuries from a death caused by negligence and provided different remedies for each type of loss. A "wrongful death" statute redresses the losses incurred by the decedent's dependents. A "survival" statute permits recovery for injuries sustained by the victim of the tort. See generally *id.* §§ 22-26; Robert M. Hughes, *Handbook of Admiralty Law* 222-223 (2d ed. 1920). In the DOHSA, Congress provided only for recovery of damages for wrongful death, and chose not to pro-

vide an action for survival damages. Petitioners ask this Court to infer that Congress intended to leave the judiciary free to develop a survival cause of action for deaths on the high seas. That submission is inconsistent with the plain language of the DOHSA, which in three respects makes clear that Congress intended to foreclose a survival action for deaths on the high seas.[4]

1. First, Congress specified for whose benefit the suit may be brought. Section 1 of the Act provides that "the personal representative of the decedent may maintain a suit for damages * * * *for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative.*" DOHSA § 1, 46 U.S.C. App. 761 (emphasis added). The inclusion of that language contrasts with the terms used in state survival statutes of that era, which generally specified that a survival action could be brought on behalf of the decedent's estate.[5] That distinction is important,

[4] From Lord Campbell's Act in 1846 (9 & 10 Vict. ch. 93) to the present time, abrogations of the common law rule that a personal injury action dies with the plaintiff have been accomplished overwhelmingly (perhaps exclusively) by legislative act. See Stuart M. Speiser, Charles F. Krause & Juanita M. Madole, *Recovery for Wrongful Death and Injury*, Appendix A (3d ed. 1992) (collecting statutes).

[5] See, *e.g.*, Conn. Gen. Stat. ch. 325, § 6177 (1918) ("No cause or right of action shall be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of such deceased person."); Mich. Comp. Laws § 10,113 (1897) ("In all personal actions, the cause of which does by law survive, * * * the action may proceed and be prosecuted by or against the surviving party, and by or against the executor or administrator of the deceased party, in the manner provided in this chapter."); 1901 N.H. Laws ch. 191, § 6 ("If a right of action existed in favor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator at any time within two years after the original grant of administration.").

State wrongful death provisions, by contrast, permitted suit only by the "personal representative" of the decedent, in much the same manner as the DOHSA provides. See, *e.g.*, 2 N.J. Comp. Stat. 1907, §§ 7-9 (1909-1910); 1910 Or. Laws §§ 378-380; Vt. Stat. ch. 133, §§ 2835, 2839, 2840 (1906); Va. Code Ann. §§ 2902-2906 (Pollard 1904). See generally

because it reflects an intent by Congress in the DOHSA to remedy the harm caused to the decedent's dependents by the wrongful death—loss of support—and not to benefit the decedent's estate, which may or may not inure to the same beneficiaries.

Second, Congress specified what kind of damages could be obtained. Section 2 of the DOHSA, 46 U.S.C. App. 762, provides that "[t]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." At the time the DOHSA was enacted, the distinction between pecuniary and non-pecuniary losses was well settled in state statutory law.[6] Pecuniary losses referred to those damages that could be quantified economically, such as lost wages or educational expenses for a de-

Tiffany, *supra*, at xx-lxxi (analytical table summarizing state wrongful death and survival statutory provisions).

[6] A number of States that permitted wrongful death actions limited recovery to "pecuniary" damages that could be shown by dependents of the decedent. See, *e.g.*, Nev. Rev. Laws § 5648 (1912) ("jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named"); Ohio Gen. Code §§ 10,770, 10,772, 10,773, 10,773-1 (1912) (limiting recovery in § 10,772 to damages "not exceeding in any case twelve thousand dollars, as the jury may think proportional to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought"); S.D. Codified Laws ch. 301, §§ 1-3, at 444a (1909) (limiting jury's discretion to award damages to $10,000, "as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought"); Vt. Stat. ch. 133, § 2840 (1906) (imposing no monetary cap, but limiting damages "to the pecuniary injuries resulting from such death, to the wife and next of kin"); Wis. Stat. ch. 178, §§ 4255-4256 (1898) (limiting jury to maximum of $5,000, "as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in this section").

pendent. Non-pecuniary losses, on the other hand, consisted of damages like mental anguish and physical pain that bore no relation to a verifiable economic value.[7] By explicitly limiting the damages to "pecuniary losses," Congress made plain its intent not to permit compensation for "non-pecuniary" damages, such as for the decedent's pre-death pain and suffering.

Third, Congress understood the difference between a death action and a survival action that conceptually perpetuates a personal injury suit. In contrast to state survival provisions, which specifically stated that an action would survive the decedent, the DOHSA contains no such provision. Instead, Congress provided only a very limited survival provision in the DOHSA for situations in which an injured victim brought a personal injury suit and then died before that suit was completed; in that event, Congress provided that the decedent's personal representative could, if the other elements of the Act are satisfied, transform the suit into the kind of wrongful death action recognized under the Act. Section 5 of the DOHSA, 46 U.S.C. App. 765, thus states that "the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this [title]."

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[7] See, *e.g.*, *Tilley* v. *Hudson River R.R.*, 24 N.Y. 471, 476 (Ct. App. 1862) ("[T]he word *pecuniary* was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value."). See generally Tiffany, *supra*, at 332-333. Some state statutes explicitly drew that distinction. See, *e.g.*, 1901 N.H. Laws ch. 191, § 12 ("If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damage in connection with other elements allowed by law.").

The dependents, in turn, are not permitted to obtain recovery in all of the same ways as the victim, but rather are limited to the "fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." DOHSA § 2, 46 U.S.C. App. 762. The court of appeals correctly observed that Section 5 of the DOHSA is "a very limited survival provision" that should be treated as "an expression of legislative judgment on the extent to which survival actions are to be permitted." Pet. App. 10a. That holding is in accord with this Court's conclusion in *Higginbotham* that "survival" of an action was one of the issues that Congress specifically considered, and "when [the DOHSA] speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U.S. at 625.

2. Petitioners' alternative readings (Pet. Br. 31-33) of the statutory language are unpersuasive. They first contend (*id.* at 32) that the permissive phrase in Section 5 ("may proceed") provides the decedent's personal representative with an option to *choose* whether to continue the action as a wrongful death suit under the DOHSA or as a survival action under the general maritime law. That construction, however, largely renders Section 5 surplusage. If the general maritime law permitted survival actions in these circumstances, then, upon death resulting from injuries, a wrongful death action under the DOHSA *and* a survival action under general maritime law would both lie. Section 5 would not be needed to protect the rights of a decedent's dependents. Given that a statute should be construed to avoid rendering particular provisions superfluous, see, *e.g.*, *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991), the more logical construction of Section 5 is that Congress did not intend to allow the decedent's personal injury suit to survive his or her death, but instead envisioned the case being converted to a wrongful death action, so long as there were pecuniary losses to qualified claimants under DOHSA Sections 1 and

2.[8] The "may proceed" language of Section 5 simply reflects Congress's decision to give decedent's dependents an option that they did not have at common law, not to provide an option of a survival action that would make the rest of the provision largely meaningless. Indeed, Congress could not have affirmatively intended to recognize a survival action under general maritime law, since *Moragne* v. *State Marine Lines*, 398 U.S. 375 (1970), which furnishes the bases for such an action, was not decided until fifty years after passage of the DOHSA. See Pet. Br. 13.

Second, petitioners contend (Pet. Br. 29-31) that the replacement of DOHSA Section 3 in 1980 with 46 U.S.C. App. 763a[9] "acknowledges Congress' approval" of coexisting survival actions that would be inconsistent with the limitations of DOHSA Sections 1, 2, and 5. They posit that the more general language of Section 763a, which specifies the triggering date for the statute of limitations as the date when "the cause of action accrued," suggests that "there is no Congressional policy to preclude the survival of actions for personal injuries which may be brought concurrently with a DOHSA death action." Pet. Br. 31. Petitioners' argument fails to acknowledge the full scope of 46 U.S.C. App. 763a in admiralty actions. By its plain terms and purpose, 46 U.S.C. App. 763a replaced Section 763 with a more generally-applicable provision. Section 763a "provide[s] for a uniform national three-year statute of limitations in actions to recover damages for personal injury or death," Act of Oct. 6, 1980, Pub. L. No. 96-382, 94 Stat. 1525, as had been permitted in Jones Act suits. See

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[8] For example, a child who dies of such injuries might not have a "wife, husband, parent, child, or dependent relative" (Section 1) whose losses could be apportioned under Section 2. See 46 U.S.C. App. 761-762.

[9] 46 U.S.C. App. 763a provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

also H. R. Rep. No. 737, 96th Cong., 2d Sess. 1 (1980). Section 763a thus applies not only to DOHSA cases, but also to a wide variety of maritime torts occurring on the high seas, including unseaworthiness claims; accidents occurring within territorial waters, including the general maritime law claims for that limited geographic area authorized by *Moragne*, 398 U.S. at 393; and maritime torts occurring on land (such as those involving longshore and harbor workers). See *Friel* v. *Cessna Aircraft Co.*, 751 F.2d 1037, 1038-1039 (9th Cir. 1985).[10]

B. The Legislative History Of The DOHSA Confirms That Congress Deliberately Omitted A Survival Action

The foregoing reading of the text and structure of the DOHSA is strongly supported by its legislative history, which provides considerable evidence that Congress understood that the Act would establish a wrongful death action that would be the exclusive remedy available to the dependents of persons who died from injuries sustained on the high seas. Petitioners' discussion of the legislative history of DOHSA (Pet. Br. 26-29), which is confined to a single floor statement in the 66th Congress, is as mistaken as it is incomplete.[11]

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[10] For cases applying 46 U.S.C. App. 763a in various non-DOHSA contexts, see, *e.g.*, *Mendez* v. *Ishikawajima-Harima Heavy Indus. Co.*, 52 F.3d 799 (9th Cir. 1995); *Mink* v. *Genmar Indus., Inc.*, 29 F.3d 1543, 1547 (11th Cir. 1994); *Butler* v. *American Trawler Co.*, 887 F.2d 20 (1st Cir. 1989); *Cooper* v. *Diamond M Co.*, 799 F.2d 176 (5th Cir. 1986), cert. denied, 481 U.S. 1048 (1987); *Coleman* v. *Slade Towing Co.*, 759 F. Supp. 1209 (S.D. Miss. 1991); *Davis* v. *Britton*, 729 F. Supp. 189, 191 (D. N.H. 1989). Those decisions accord with the codifier's notes to Section 763a, which state that it "was *not* enacted as part of * * * the Death on the High Seas Act, which comprises this Chapter." 46 U.S.C. App. 763a, Codification Note (emphasis added).

[11] Petitioners assert (Pet. Br. 29) that "there is nothing in either DOHSA itself or the history back to its passage to suggest that Congress meant to deal with, let alone eliminate, survival actions." The sources on which they rely for that contention, however, are themselves incomplete. First, they cite Representative Volstead's floor statements when the bill was about to be passed. See *id.* at 27-28. They do not

414 U.S. 573, 583-591 (1974).[20] Similarly, state wrongful death and survival statutes may supplement a *Moragne* action for wrongful death occurring on state territorial waters when no federal statute specifies the appropriate relief and the decedent is not a seaman, longshore worker, or person otherwise engaged in the maritime trade. See *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199 (1996). Relying, *inter alia*, on *Tallentire* and *Higginbotham*, the Court has distinguished federal maritime actions for wrongful death occurring on state territorial waters with those governed by the DOHSA by holding that "[w]hen Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." *Id.* at 215. A death on state territorial waters does not present that concern.[21]

But when the death occurs on the high seas, as in this case, there is no gap to fill. The DOHSA—rather than the

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[20] Although the Court permitted nonpecuniary damages for loss of society in *Gaudet*, it held that "mental anguish or grief * * * is not compensable under the maritime wrongful-death remedy." 414 U.S. at 585 n. 17. *Gaudet* has subsequently been confined to its facts. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 31-32 (1990).

[21] The Court, as it had done in the past, declined to say whether the reasoning of *Moragne* may be extended to permit a survival cause of action under the general maritime law in the absence of a state survival statute. See *Yamaha Motor Corp.*, 516 U.S. at 210 n.7; see also *Miles*, 498 U.S. at 34. Several courts of appeals, however, have held that federal maritime law does provide for a survival cause of action in cases governed by *Moragne*. See, *e.g.*, *Wahlstrom* v. *Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1093 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994); *Miles* v. *Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), aff'd *sub nom. Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987); *Evich* v. *Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Barbe* v. *Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Spiller* v. *Thomas M. Lowe, Jr., & Assocs.*, 466 F.2d 903, 909 (8th Cir. 1972); *Greene* v. *Vantage S.S.*, 466 F.2d 159, 166 (4th Cir. 1972); *Ward* v. *Union Barge Line Corp.*, 443 F.2d 565, 569 (3d Cir. 1971), overruled in part on other grounds, *Cox* v. *Dravo Corp.*, 517 F.2d 620 (3d Cir. 1975) (en banc). That issue is not presented in this case.

general maritime law—governs the action, and the remedies provided in that Act cannot be supplemented by the federal maritime measure of damages recognized in *Gaudet* for *Moragne*-type causes of action arising from deaths in territorial waters.

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. *The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages.* The Act does not address every issue of wrongful-death law but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

Higginbotham, 436 U.S. at 625 (citations omitted; emphasis added); see also *ibid.* ("Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements."). Recognizing that there is "a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted," the Court held that "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Ibid.* (emphasis added). See also *Tallentire*, 477 U.S. at 230 (holding that DOHSA's pecuniary loss remedy could not be supplemented to include nonpecuniary damages otherwise recoverable under a seemingly applicable state statute, because it would be "incongruous" to think "that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas"). Thus, relying on its reasoning in *Higginbotham*, the Court in *Tallentire* held that "Congress has 'struck the balance for us' in determining that survivors should be restricted to the re-

covery of their pecuniary losses, and when DOHSA 'does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.'" *Id.* at 232 (quoting *Higginbotham*, 436 U.S. at 625).

Finally, even as it was reserving the question presented in this case, the Court in *Zicherman* underscored that the remedies in the DOHSA are exclusive when the death occurs on the high seas. 516 U.S. at 230 n.4. In that case the Court rejected an effort to supplement the DOHSA's pecuniary remedies standard with nonpecuniary damages for loss of society: "[W]here DOHSA applies, neither state law nor general maritime law can provide a basis for recovery of loss-of-society damages." *Id.* at 229 (citations omitted). Congress carefully considered and plainly rejected a provision that would have allowed a survival cause of action. It follows, therefore, that the DOHSA cannot be supplemented to authorize an award of the pre-death pain and suffering damages sought by petitioners in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
ROBERT S. GREENSPAN
PHILIP A. BERNS
BARBARA B. O'MALLEY
BRUCE G. FORREST
DAVID B. SALMONS
Attorneys

MARCH 1998